IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, et al. - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - Respondents

(Other respondents named on inside cover)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. BRUCE MILLER
Jefferson County Attorney
Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

Of Counsel:

BEN J. TALBOTT, JR.
MIDDLETON, REUTLINGER & BAIRD
501 South Second Street
Louisville, Kentucky 40202

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

Additional Respondents in this case are Lyman Johnson, Richard Miller, Aaron Howard, John Schmidt, Earl Alluisi, John R. Hughes, Sarah White, Johnie Wright, Suzanne Post, Hazel K. Lane, American Federation of Teachers, Jefferson County Federation of Teachers, Local 672, and the Kentucky Human Relations Commission.

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v.

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v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - - - *Respondents*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

For the reasons set forth in the Petition for Writ of Certiorari previously filed herein and for the further reasons set forth in this Supplemental Brief, the Petitioner, L. J. Hollenbach, III, County Judge of Jefferson County, Kentucky, respectfully prays that a writ of certiorari issue to review the decision rendered in this case on March 11, 1977, by the United States Court of Appeals for the Sixth Circuit.

AUTHORITY FOR SUPPLEMENTAL BRIEF

The Petitioner has previously filed a Petition for Writ of Certiorari in this case. Relevant new decisions have since been handed down by this Court. Therefore, this Supplemental Brief is filed pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, which states:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

REASON FOR SUPPLEMENTAL BRIEF

This class action is a school desegregation case involving the public schools in Jefferson County, Kentucky. As the chief executive officer of that county, on December 22, 1975, Petitioner was allowed to intervene in this suit by the District Court for the purpose of filing an alternative desegregation plan.

Petitioner's plan was filed on April 22, 1976, and on May 4, 1976 a hearing was begun on that plan. During the course of the hearing, Petitioner's counsel argued that in a system with limited and narrow segregative actions it was not necessary to remove the racial identifiability of every school in Jefferson County. More specifically, Petitioner's counsel argued that it was not necessary to racially balance those schools which were racially identifiable only as a result of neighborhood makeup. The District Court rejected

this argument and held that because the Petitioner's plan failed to eliminate the racial identifiability of every school in Jefferson County that plan did not meet constitutional requirements as set forth by the Court of Appeals for the Sixth Circuit.* Consequently, on May 15, 1976, Petitioner was dismissed as a party to this action.

Petitioner appealed the decision of the District Court, but on March 11, 1977, the Court of Appeals for the Sixth Circuit dismissed the Petitioner's appeal and thus, in effect, affirmed the decision of the District Court.

On June 9, 1977, the Petitioner filed a Petition for Writ of Certiorari with respect to the Sixth Circuit's order of March 11, 1977. Since that time, however, this Court has issued three important decisions with a direct bearing on the case at hand, i.e., *Dayton* v. *Board of Education* v. *Brinkman,* —— U. S. ——, 45 L. W. 4910 (June 27, 1977), reversing the order of the Court of Appeals for the Sixth Circuit, and *Brennan* v. *Armstrong,* —— U. S. ——, 45 L.W. 3850 (June 28, 1977), and *School District of Omaha* v. *U. S.,* —— U. S. ——, 45 L.W. 3850 (June 28, 1977),** both of which cited the *Dayton* v. *Brinkman* opinion as their sole authority.

Because of their similarity to the issues presented in this Petition for Certiorari, and further because it was the same Sixth Circuit which erred in both *Dayton* v. *Brinkman, supra,* and here, these recent de-

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*For this discussion between Petitioner's counsel and the District Court see the Appendix attached hereto.

**All three opinions are contained in the Addendum hereto beginning on page 19.

cisions are important to this case. Therefore, this Supplemental Brief is directed to an analysis of the issues now before this Court in light of the above decisions.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Lower Court's Conclusion That All Racially Imbalanced Schools Must Be Eliminated In Jefferson County Is Clearly Erroneous When Examined In the Light of *Dayton v. Brinkman*, Etc.

The circumstances of the instant case are strikingly similar to those found in *Dayton* v. *Brinkman, supra.* In both cases the Sixth Circuit has focused on the existence of racially imbalanced schools and optional attendance zones as clear vestiges of state-imposed segregation requiring corrective action by the federal courts.

Furthermore, in both cases the Sixth Circuit did not itself specify a remedy for these "violations," but left little doubt in the minds of the district courts that there would be no feasible way to comply with the orders of the Court of Appeals without a substantial amount of student transportation.*

*In the instant case, the Sixth Circuit particularly made this clear by its severe criticism of neighborhood school zoning where such zoning resulted in racially identifiable schools. Thus, the Sixth Circuit stated:

> "Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. The measure of any plan is its effectiveness in accomplishing desegregation. [Cite omitted.] Because of the residual effects of past discrimination, the Louisville zoning assignment plan has not been effective despite the good intentions of the school board." *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925, 931 (6th Cir. 1973).

Thus, in the present case, for example, despite the original finding of the District Court that the public schools in Jefferson County were not operated in an unconstitutional manner, the Sixth Circuit, in overruling that decision, stated as follows:

> "A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated." *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925, 930 (6th Cir. 1973).

Moreover, the Sixth Circuit reached this conclusion even though the District Court had specifically found that the racial makeup of these schools was due to neighborhood racial makeup.

As was true of *Dayton* v. *Brinkman, supra,* the Sixth Circuit did not reverse the findings of fact which had been made by the District Court, nor did it engage in its own fact-finding based on evidence adduced before the District Court. Nevertheless, the Sixth Circuit clearly indicated its own view of the law as requiring the elimination of racially identifiable schools in any system which has once (apparently no matter how long ago) practiced segregation by law. Thus, racially identifiable schools were made synonymous with vestiges of state-imposed segregation, and the Sixth Circuit ordered the District Court to eliminate all such vestiges.

As in *Dayton* v. *Brinkman, supra,* even though the Sixth Circuit did not itself actually specify a remedy, it did indicate that the remedial plan was to be system-

wide* and designed to eliminate racially identifiable schools. As was also true of *Dayton* v. *Brinkman, supra,* the District Court naturally concluded in the instant case that there was no feasible way to comply with the mandate of the Court of Appeals except by the imposition of racial quotas and the substantial cross-county busing of children.

It was also because of this view that the alternative plan of this Petitioner was rejected by the lower courts. Petitioner believes, however, that in *Dayton* v. *Brinkman, supra, Brennan* v. *Armstrong, supra* and *School District of Omaha* v. *U. S., supra,* this Court has once again made clear that the law does not require the elimination of all racially identifiable schools. Even in a system which has once practiced segregation by law, such schools are not necessarily a vestige of such state-imposed segregation, if, in fact, they were not caused by it. Thus, to require the balancing of all such schools in these circumstances is erroneous. For as this Court states in *Dayton* v. *Brinkman,* 45 L. W. at 4913, Addendum at 30-31.

> "Viewing the findings . . . in the strongest light for the respondents, the Court of Appeals

*Actually, in the *Newburg* decision, the Sixth Circuit suggested more than that the remedy be system-wide, it suggested that it be county-wide. Although this involved the crossing of school district boundaries, the Sixth Circuit relied on its own opinion handed down in *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. 1973), an opinion later reversed by this Court in *Milliken* v. *Bradley,* 418 U. S. 717 (1974), and found the crossing of school district lines perfectly permissible where necessary to eliminate racially identifiable schools. (See *Newburg, supra,* 489 F. 2d at 932.) This issue was later eliminated, however, when the Louisville and Jefferson County school systems merged under state law in 1975.

> simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. There had been no showing that such a remedy was necessary to 'eliminate all vestiges of the state-imposed school segregation.' It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominately black. This fact without more, of course, does not offend the Constitution. [Cite omitted.] The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of 'fruit of the poisonous tree' since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope."

The similarities between *Dayton* v. *Brinkman, supra,* and Jefferson County are: (1) racially imbalanced schools resulting mostly from demographic patterns; (2) optional attendance policies which the courts in both instances found had been applied fairly and without discrimination, and (3) inappropriate attendance zones which in both cases affected only three schools. As the Court explicitly held in *Dayton* v. *Brinkman, supra,* these violations did not justify imposition of a system-wide remedy even in a system which formerly had practiced segregation by law. The Court's conclusion might be expressed by the following equation: racially imbalanced schools, plus optional attendance

policies, plus a failure to redistrict certain attendance zones *does not equal* (i.e., does not require) system-wide busing. Moreover, in the case at bar, the finding that the pupil population in the various Jefferson County schools "is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." *Dayton* v. *Brinkman,* 45 L. W. at 4912, Addendum at 27.

In summary, the situation in the instant case is virtually identical to the circumstances in *Dayton* v. *Brinkman, supra; Brennan* v. *Armstrong, supra;* and *School District of Omaha* v. *U. S., supra,* and its outcome should be the same.

II. Since the Lower Courts At No Time Have Determined How Much Incremental Segregative Effect Resulted From the Jefferson County School System's Limited Constitutional Violations, A Hearing On This Question Is Now Clearly Required In Light Of *Dayton v. Brinkman*, Etc.

When the Sixth Circuit reversed the District Court's decision that the Jefferson County schools were not unlawfully segregated, no attempt was made by either that court or the District Court upon remand to determine how much incremental segregative effect the violations had on the racial distribution of the Jefferson County schools. In its order of remand, the Court of Appeals only mandated that the District court was promptly to design and implement a systemwide

remedy which would eliminate racially identifiable schools.

In the argument of Petitioner's counsel to the District Court, the Petitioner attempted to point out that before holding that it was necessary to racially balance the entire school system of Jefferson County, the District Court should first have attempted to define the vestiges of state-imposed segregation, that is, to determine the effect of the unlawful state action on the school system's racial distribution. A portion of that discourse is as follows:

Mr. Talbott:

"The real nature of the suggestion which the Intervenor makes in this case is that the removal of racial identification in every school in Jefferson County goes far beyond the removal of the vestiges of state-imposed segregation. * * *

Your Honor, we feel that before a plan is implemented to create racial balance in the entire Jefferson County school system, to require certain racial quotas or percentages in every school in the school system, the Court ought at least to address itself to the question—and this would require appropriately, Your Honor: 'What exactly are the vestiges of state-imposed segregation in the Jefferson County School System?' "

The Court:

"Let me take square issue with that. I held that there were no vestiges of state-imposed segregation in Jefferson County. And the Sixth Circuit reversed, and emphatically held that there were state-imposed vestiges of segregation, period.

They didn't ask me to go back and see what they were." Appendix at 16-17.

The most recent opinions of this Court in *Dayton* v. *Brinkman, supra, Brennan* v. *Armstrong, supra,* and *School District of Omaha* v. *U. S., supra,* all make it abundantly clear that before imposing a plan which requires the elimination of all racially identifiable schools, the lower courts must first determine that such racial imbalance is the result of some unlawful state action. Thus, as was stated by this Court in identical language in both *Brennan* v. *Armstrong* and *School District of Omaha* v. *U. S.:*

> "Neither the District Court in ordering development of a remedial plan, nor the Court of Appeals in affirming, addressed itself to the inquiry mandated by our opinion in No. 76-539, *Dayton Board of Education* v. *Brinkman,* in which we said:
>
> 'If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.' Slip. op., at 13-14.
>
> The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration . . ." *Brennan* v. *Armstrong, supra,* 45 L. W. at 3850, Addendum at 38-39; *School District of Omaha* v. *U. S.,* 45 L. W. at 3850, Addendum at 42.

It is interesting to note that the District Court implicitly anticipated the emergence of this standard in its original decision in 1973. In that decision the District Court specifically found that there was no incremental segregative impact resulting from school attendance policies. Indeed, the Court found that there was even greater integration in the schools than in the neighborhoods they served.

In the school desegregation cases relied upon herein, this Supreme Court has had to deal with the over-utilization by the circuit courts of appeals, and particularly by the Court of Appeals for the Sixth Circuit, of a presumption that racially identifiable schools are *per se* unconstitutional in a system which has formerly practiced segregation by law. *Dayton* v. *Brinkman* requires as a condition precedent to a system-wide remedy that a casual connection be demonstrated between impermissible state action on the one hand and racially identifiable schools on the other.

The system-wide racial balancing through quotas with its consequential massive busing imposed in the instant case ignores the question of whether or not impermissible state action caused to any degree the existence of racially identifiable schools in Jefferson County. Yet under the standards enunciated by this Court, this question must be examined. The Petitioner, therefore, and the other parties to this action, should now be given an opportunity at the district court level to develop the proof on whether or not the admitted racial identifiability of certain schools is in any way a result or increment of any impermissible state action.

Moreover, in the light of such an inquiry, these same parties should be allowed to present alternative desegregation plans designed specifically to remedy such incremental effects as may be demonstrated through such an inquiry.

CONCLUSION

For the reasons set forth in this Supplemental Brief and in the previously filed Petition for Writ of Certiorari, Petitioner respectfully submits that this Court should issue a writ of certiorari as herein requested and should remand this case for reconsideration in light of this Court's recent opinions in the school desegregation cases.

Respectfully submitted,

J. BRUCE MILLER
Jefferson County Attorney
1112 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

Of Counsel:

BEN J. TALBOTT, JR.
MIDDLETON, REUTLINGER & BAIRD
501 South Second Street
Louisville, Kentucky 40202

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1977, three copies of this Supplemental Brief in Support of Petition for Writ of Certiorari were hand-delivered to: Mr. Thomas L. Hogan, 701 W. Walnut Street, Louisville, Kentucky 40202; Mr. John A. Fulton, 2510 First National Tower, Louisville, Kentucky 40202; and to Mr. Henry A. Triplett, 231 South Fifth Street, Louisville, Kentucky 40202, said counsel representing the parties required to be served and said service having conformed to the requirements of Rule 21(1) and Rule 33 of the Supreme Court Rules.

J. BRUCE MILLER
Jefferson County Attorney
1112 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7045/7291

NEWBURG AREA COUNCIL, INC., ET AL. - - *Plaintiffs*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, ET AL. - - - - - - - *Defendants*

L. J. HOLLENBACH, III - - - - *Intervenor*

TRANSCRIPT OF PROCEEDINGS OF MAY 4, 1976

The following Hearing, coming on to be heard before Honorable James F. Gordon, Senior Judge, United States District Court, Western District of Kentucky, at Louisville, Jefferson County, Kentucky, on May 4, 1976, at 9:30 A.M. The following colloquy is a portion of the discussion between District Court Judge James F. Gordon and Petitioner's counsel, Ben J. Talbott. This discussion was pursuant to a motion made by Respondents' counsel to dismiss Petitioner because of the admission of his witness, Professor James S. Coleman, that the Coleman alternative desegregation plan would not remove the racial identifiability of every school in Jefferson County. The discussion is contained in Vol. IV, pp. 99-103 of the Transcript and on pp. 109-112 of the Appendix below to the Court of Appeals for the Sixth Circuit.

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Vol. IV, p. 99

The Court: Gentlemen, as I see, and I recognize the legitimacy of your arguments, Mr. Talbott, I recognize the sincerity of Judge Hollenbach's assertions, but I am just overwhelmed by the fact that the assertions he asks do not meet the requirements of me by the Sixth Circuit.

And if Judge Hollenbach can take this present ruling and go to the Sixth Circuit and reverse me, then the Sixth Circuit will be required, I think, to change what they heretofore told. If they want to change it, then that is up to them. I am not on that Court, and I will abide by however they change it.

But, until they do change it, in the simple-minded manner in which I read it, I am going to stand by what I think it says now. And I'm going to sustain the motion, and dismiss this intervening.

Mr. Talbott: Your Honor, can I make some response? I think that the language that Your Honor

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read indicated that the Sixth Circuit has ordered the removal of the vestiges of State imposed segregation from this system. And, Your Honor, the Intervenor in this case is in perfect agreement with that language and with that command to you, Your Honor.

The real nature of the suggestion which the Intervenor makes in this case is that the removal of racial identification in every school in Jefferson County goes far beyond the removal of the vestiges of State imposed segregation.

For example, Your Honor, in Male School, which would be in a zoned school situation, without the imposition of Your Honor's plan, all black, is all black today, even though as a part of a former invalid state system, it was part of an all white plan.

Your Honor, the fact that state law previously commanded that that school be all white, the Intervenor sees in no part playing any effect in today's racial balance and

creating that as an all black school. So, Your Honor, we think that there is a serious distinction between the question of "racial identification" which, in many cases, could be created for reasons that are purely de facto, and the "vestiges of State imposed segregation," and I think that it's in the difference in the reading of that language that the

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Intervenor takes a different position and attitude from that taken by the plaintiffs, and possibly from that taken by Your Honor.

But in the Keyes case, as Your Honor is well aware of, the Supreme Court mandated the case back, remanded the case back to the District Court for purposes of hearing exactly what the vestiges of State imposed segregation were in that case.

Your Honor, we feel that before a plan is implemented to create racial balance in the entire Jefferson County School System, to require the meeting of certain racial quotas or percentages in every school in the school system the Court ought at least to address itself to the question—and this would require appropriately, Your Honor: "What exactly are the vestiges of State imposed segregation in the Jefferson County School System?"

The Court: Let me take square issue with that. I held that there were no vestiges of State imposed segregation in Jefferson County. And the Sixth Circuit reversed, and emphatically held that there were State imposed vestiges of segregation, period.

They didn't ask me to go back and see what they were. They found them in the record of the hearing I had already conducted. So that

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is as closed an issue as the War of 1812.

Mr. Talbott: Your Honor, they found them, and I agree with the Sixth Circuit, that they existed, and they also

required Your Honor to remove them. I think that still leaves open the question of exactly what is the Sixth Circuit requiring to be removed in this case?

We do not feel that the racial identification of every school in Jefferson County is a vestige of a former invalid state system.

The Court: That's our difference of opinion right there. And if you can sell them on that, it will be fine with me. It will be fine with me if you can sell them on it. And you are in Court. I let you in. You go in and do your good level best.

Mr. Talbott: Your Honor, with respect to that matter, I want to reiterate what Mr. Miller has earlier said. The Intervenor and his Counsel in this case want to thank you, again, for having allowed us in the case. We appreciate it.

The Court: I'm sorry, but this has to be my position about it.

Mr. Talbott: Your Honor, I think you have clarified for us at this point what you feel to be the law of this case.

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The Court: You have got a very concise, clear record. Whether I'm right in my thoughts about it, or whether you are right in yours, I don't know. And you get to that clearly and squarely presented to them without being encumbered in any fashion.

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ADDENDUM

UNITED STATES SUPREME COURT

No. 76-539

DAYTON BOARD OF EDUCATION et al., Petitioners, *v.* MARK BRINKMAN et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 27, 1977]

Syllabus

In this school desegregation case the District Court after an evidentiary hearing held that petitioner, Dayton, Ohio, School Board, had engaged in racial discrimination in the operation of the city's schools. On the basis of a "cumulative violation" of the Equal Protection Clause that the court found, which was composed of three elements, *viz.*, (1) substantial racial imbalance in student enrollment patterns throughout the school system; (2) the use of optional attendance zones allowing some white students to avoid attending predominantly black schools; and (3) the School Board's rescission in 1972 of resolutions passed by the previous Board that had acknowleged responsibility in the creation of segregative racial patterns and had called for various types of remedial measures, the District Court, following reversals by the Court of Appeals of more limited remedies, ultimately formulated and the Court of Appeals approved, a systemwide remedy. The plan required, beginning with the 1976-1977 school year, that the racial composition of each school in the district be brought within 15% of Dayton's 48%-52% black-white population ratio, to be accomplished by a variety of deseg-

regation techniques, including the "pairing" of schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." *Held:*

1. Judged most favorably to respondent parents of black children, the District Court's findings of constitutional violations did not suffice to justify the systemwide remedy. The finding that pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment absent a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis,* 426 U. S. 229, 239. The court's finding as to the option attendance zones applies to three high schools, and assuming that under *Washington* standards a violation was involved, only high school districting was implicated. And the conclusion that the Board's rescission action constituted a constitutional violation is of dubious soundness. It was thus not demonstrated that the systemwide remedy, in effect imposed by the Court of Appeals, was necessary to "eliminate all vestiges of the state-imposed school segregation."

2. In view of the confusion at various stages in this case as to the applicable principles and appropriate relief, the case must be remanded to the District Court. The ambiguous phrase "cumulative violation" used by both courts below, does not overcome the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed. More specific findings must be made, and if necessary, the record must be supplemented. Conclusions as to violations must be made in light of this Court's opinions here and in *Washington* v. *Davis, supra,* and *Village of Arlington Heights* v. *Metroplitan Housing Development Corp.,* 429 U. S. 252, and a remedy must be fashioned in light of the rule laid down in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1,

and elaborated on in *Hills* v. *Gautreaux,* 425 U. S. 284. In a case like this, where mandatory racial segregation has long since ceased, it must first be determined if the school board intended to, and did in fact, discriminate, and all appropriate additional evidence should be adduced; and only if systemwide discrimination is shown may there be a systemwide remedy. Meanwhile, the present plan should remain in effect for the coming school year subject to further District Court orders as additional evidence might warrant.

539 F. 2d 1084, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in the judgment. MARSHALL, J., took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those protracted proceedings have been devoted to the for-

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[1]This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan,* 503 F. 2d 684 (CA 6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App., at 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modi-

(Footnote continued on following page)

mulation of a remedy for actions of the Dayton Board of Education found to be in violation of the Equal Protection Clause of the Fourteenth Amendment. In the decision now under review, the Court of Appeals for the Sixth Circuit finally approved a plan involving districtwide racial distribution requirements, after rejecting two previous, less sweeping orders by the District Court. The plan required, beginning with the 1976-1977 school year, that the racial distribution of each school in the district be brought within 15% of the 48%-52% black-white population ratio of Dayton.[2] As finally formulated, the plan employed a variety of desegregation techniques, including the "pairing"[3] of

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(Footnote continued from preceding page)

fied and expanded in an effort to comply with the Court of Appeals mandate. App., at 73. On appeal, the Court of Appeals again reversed as to remedy and directed that the District Court adopt a system-wide plan for the 1976-1977 school year. . . ." *Brinkman* v. *Gilligan*, 518 F. 2d 853 (CA 6 1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App., at 99. On March 25, 1976, the details of the plan were approved by the District Court. App., at 110. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (CA 6 1976).

[2]The District Court said that it would deal on a case-by-case basis with failures to bring individual schools into compliance with this requirement. It also ordered that students already enrolled in the tenth and eleventh grades be allowed to finish in their present high schools, and announced the following "guidelines" to be followed "whenever possible" in the case of elementary school students.

"1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

"2. Students should be transported to the nearest available school;

"3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter." App., at 104.

[3]"Pairing" is the designation of two or more schools with contrasting racial composition for an exchange program where a large portion of the students in each school attend the paired school for some period. In the plan adopted by the District Court, it was the primary remedy used in the case of elementary schools.

schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." We granted certiorari, ____ U. S. ____ (Jan. 17, 1976), to consider the propriety of this court-ordered remedy in light of the constitutional violations which were found by the courts below.

Whatever public notice this case has received as it wended its way from the United States District Court for the Southern District of Ohio to this Court has been due to the fact that it represented an effort by minority plaintiffs to obtain relief from alleged unconstitutional segregation of the Dayton public schools said to have resulted from actions by the respondent School Board. While we would by no means discount the importance of this aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system.

Indeed, the importance of the judicial administration aspects of the case are heightened by the presence of the substantive issues on which it turns. The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a case such as this where the District Court for the Southern District of Ohio was not simply asked to render judgment in accordance with the law of Ohio in favor of one private party against another; it was asked by the plaintiffs, students in the public school system of a large city, to restructure the administration of that system.

There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973); *Wright* v. *Council of City of Emporia*, 407 U. S.

451 (1972); *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U. S. 1 (1971). But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley*, 418 U. S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia*, *supra*, at 469. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

The lawsuit was begun in April 1972, and the District Court filed its original decision on February 7, 1973. The District Court first surveyed the past conduct of affairs by the Dayton School Board, and found "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system."[4] It cited instances of physical segregation in the schools during the early decades of this century,[5] but concluded that "[b]oth by reason of the substantial time that had elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy."

The District Court also found that as recently as the 1950s, faculty hiring had not been on a racially neutral basis, but that "by 1963, under a policy designated as one of

[4]The court pointed out that since 1888, Ohio law as construed by its Supreme Court has forbidden separate public schools for black and white children. See Ohio Rev. Code § 3313.48; *Board of Education* v. *State*, 45 Ohio St. 555 (1888).

[5]"'Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.'' App., at 2-3 (footnote omitted).

'dynamic gradualism,' at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system." It further found that by 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. The Court's conclusion with respect to faculty hiring was that pursuant to a 1971 agreement with the Department of HEW, "the teaching staff of the Dayton public schools became and still remains substantially integrated."[6]

The District Court noted that Dunbar High School had been established in 1933 as a black high school, taught by black teachers and attended by black pupils. At the time of its creation there were no attendance zones in Dayton and students were permitted liberal transfers, so that attendance at Dunbar was voluntary. The court found that Dunbar continued to exist as a citywide all-black high school until it closed in 1962.

Turning to more recent operations of the Dayton public schools, the District Court found that the "great majority" of the 66 schools were imbalanced and that, with one exception,[7] the Dayton School Board had made no affirmative effort to achieve racial balance within those schools. But the court stated that there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions. It considered the use of optional attendance zones[8] within the District, and concluded

[6]The court also considered employment of nonteaching personnel, and observed that blacks made up a proportion of the nonteaching, nonadministrative personnel equal to the proportion of black students in the District, though in certain occupations they were represented at a substantially lower rate.

[7]The court noted that a concerted effort had been made in the past few years to enroll more black students at the Patterson Co-op High School.

[8]An optional zone is an area between two attendance zones, the student residents of which are free to choose which of the two schools they wish to attend.

that in the majority of cases the "optional zones had no racial significance at the time of their creation." It made a somewhat ambiguous finding as to the effect of some of the zones in the past,[9] and concluded that although none of the elementary optional school attendance zones today "have any significant potential effects in terms of increased racial separation," the same cannot be said of the high school optional zones. Two zones in particular, "those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."[10]

The court found no evidence that the District's "freedom of enrollment" policy had "been unfairly operated or that black students [had] been denied transfers because of their race." Finally the court considered action by a newly elected Board on January 3, 1972, rescinding resolutions, passed by the previous Board, which had acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures. The District Court's ultimate conclusion was that the "racially imbalanced schools, optional attendance zones, and the recent Board action . . . are cumulatively a violation of the Equal Protection Clause."

The District Court's use of the phrase "cumulative violation" is unfortunately not free from ambiguity. Treated most favorably to the respondents, it may be said to represent the District Court's opinion that there were three sep-

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[9]The District Court found that three high school optional zones "may have" had racial significance at the time of their creation.

[10]The following information about those zones is contained in an appendix to the District Court opinion:

High Schools	Date of Creation	% black population At date of creation	1972-73
Roosevelt/	1951	31.5	100.0
Colonel White	(extended 1958)	0.0	54.6
Kiser/	1962	2.7	9.8
Colonel White		1.1	54.6

arate although relatively isolated instances of unconstitutional action on the part of petitioners. Treated most favorably to the petitioners, however, they must be viewed in quite a different light. The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, assuming that it was a violation under the standards of *Washington* v. *Davis, supra*, appears to be so only with respect to high school districting. *Swann, supra*, at 15. The District Court's conclusion that the Board's recision of previously adopted school board resolutions was itself a constitutional violation is also of questionable validity.

The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U. S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty,

then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." 503 F. 2d 684, 697.

Judged most favorably to the petitioners, then, the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed. Nor is light cast upon the District Court's finding by its repeated use of the phrase "cumulative violation." We realize, of course, that the task of factfinding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 L. W. 4073 (Jan. 11, 1973), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

We think it accurate to say that the District Court's formulation of a remedy on the basis of the three part "cumulative violation" was certainly not based on an unduly cautious understanding of its authority in such a situation. The remedy which it originally propounded in light of these findings of fact included requirements that optional attendance zones be eliminated, and that faculty assignment practices and hiring policies with respect to classified personnel be tailored to achieve representative racial distribution in all schools.[11] The one portion of the remedial

[11]The District Court's first plan also contained the following provisions:

(V) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system;

(Footnote continued on following page)

plan submitted by the School Board which the District Court refused to accept without change was that which dealt with so-called "freedom of enrollment priorities." The court ordered that, as applied to high schools, new students at each school be chosen at random from those wishing to attend.[12] The Board was required to furnish transportation for all students who chose to attend a high school outside the attendance area of their residence.

Both the plaintiffs and the defendant School Board appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit. 503 F. 2d 684. That court considered at somewhat greater length than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the adoption of the Board's resolutions and the subsequent recission of those resolutions. This consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no factfinding of its own based on evidence adduced before the District Court. The Court of Appeals then focused on the District Court's finding of a three-part "cumulative" constitutional violation consisting of racially imbalanced schools, optional attendance zones, and the recision of the

(Footnote continued from preceding page)

(VI) Combination of two high schools into a unified cooperative school with district-wide attendance areas;

(VII) Formation of elementary and high school all-city bands, orchestras and choruses;

(VIII) Provisions for scheduling of integrated athletics;

(IX) Establishment of a minority language program for education of staff;

(X) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama;

(XI) Creation of centers for rumor control, school guidance and area learning. See App., at 35-36.

[12]The court thus eliminated a provision within the Board plan which gave first priority to students residing within the school's attendance zone.

Board resolutions. It found these to be "amply supported by the evidence."

Plaintiffs in the District Court, respondents here, had cross-appealed from the order of the District Court, contending that the District Court had erred in failing to make further findings tending to show segregative actions on the part of the Dayton School Board, but the Court of Appeals found it unnecessary to pass on these contentions. The Court of Appeals also stated that it was unnecessary to "pass on the question of whether the rescission [of the Board resolutions] by itself was a violation of" constitutional rights. It did discuss at length what it described as "serious questions" as to whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included within the "cumulative violation" found by the District Court. But it did no more than discuss these questions; it neither upset the factual findings of the District Court nor did it reverse the District Court's conclusions of law.

Thus the Court of Appeals, over and above its historical discussion of the Dayton school situation, dealt with and upheld only the three-part "cumulative violation" found by the District Court. But it nonetheless reversed the District Court's approval of the school board plan as modified by the District Court, because the Court of Appeals concluded that "the remedy ordered . . . is inadequate, considering the scope of the cumulative violations." While it did not discuss the specifics of any plan to be adopted on remand, it repeated the admonition that the court's duty is to eliminate "all vestiges of state-imposed school segregation." *Keyes, supra,* at 202; *Swann, supra,* at 15.

Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy

which it apparently did. There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler,* 404 U. S. 1027 (1972); *Swann, supra,* at 24. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree," since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(b). If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law.

The Court of Appeals did not actually specify a remedy, but did, in increasingly strong language in subsequent opinions require that any plan eliminate systemwide patterns of one-race schools predominant in the district. 518

F. 2d 853, 855. In the face of this commandment, the District Court, after twice being reversed, observed:

> "This court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required."

We think that the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders by the Court of Appeals had it not reached this conclusion. In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents.

This is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the petitioners. As we have noted, respondents appealed from the initial decision and order of the District Court, asserting that additional violations should have been found by that court. The Court of Appeals found it unnecessary to pass upon the respondents' contentions in its first decision, and respondents have not cross-petitioned for certiorari from decision of the Court of Appeals in this Court. Nonetheless, they are entitled under our precedents to urge any grounds which would lend support to the judgment below, and we think that their contentions of unconstitutionally segregative actions, in addition to those found as fact by the District Court, fall into this category. In view of the con-

fusion at various stages in this case, evident from the opinions both of the Court of Appeals and the District Court, as to the applicable principles and appropriate relief, the case must be remanded to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence.

If the only deficiency in the record before us were the failure of the Court of Appeals to pass on respondents' assignments of error respecting the initial rulings of the District Court, it would be appropriate to remand the case to that court. But we think it evident that supplementation of the record will be necessary. Apart from what has been said above with respect to the use of the ambiguous phrase "cumulative violation" by both courts, the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy. It is clear that the presently mandated remedy cannot stand upon the basis of the violations found by the District Court.

The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, *Washington* v. *Davis, supra,* and *Village of Arlington Heights, supra.* It must then fashion a remedy in the light of the rule laid down in *Swann, supra,* and elaborated upon in *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised only on the basis of a constitutional violation.' [*Milliken* v. *Bradley*], 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16. See *Rizzo* v. *Goode,* 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' 418 U. S., at 744; *Swann, supra,* at 16." *Hills, supra,* at

294. See also *Austin Independent School Dist.* v. *United States*, ____ U. S. ____ (1976) (MR. JUSTICE POWELL, concurring).

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra,* at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

While we have found that the plan implicitly if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we

think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

The judgment of the Court of Appeals is vacated, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i. e., busing] when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973) . . . ." *Ante,* at 3. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed, none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the school board appearing in the record should be used to support the result. The United States, as *amicus curiae,* concedes that the "three-part 'cumulative' violation found by the district court does not support its remedial order," Brief at 21, and also urges us to affirm the busing order by resort to other, additional evidence in the record. Under this circumstance, I agree with the result reached by the Court. I do so because it is clear from the holding in this case, and that in *Milliken* v. *Bradley*, ____ U. S. ____, ____ (1977), also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired.

This case thus does not turn upon any doubt of power in the federal courts to remedy state-imposed segregation. Rather, as the Court points out, it turns upon the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Ante,* at 3. As the Court recognizes, the task of the district courts and courts of appeals is a particularly difficult one in school desegregation cases, *ante,* at 14. Although the efforts of both the District Court and the Court of Appeals in this protracted litigation deserve our commendation, it is plain that the proceedings in the two courts resulted in a remedy going beyond the violations so far found.

On remand, the task of the District Court, subject to review by the Court of Appeals, will be to make further findings of fact from evidence already in the record, and, if appropriate, as supplemented by additional evidence. The additional facts, combined with those upon which the violations already found are based, must then be evaluated to determine what relief is appropriate to remedy the resulting unconstitutional segregation. In making this determination, the courts of course "need not, and cannot, close their eyes to inequities, shown by the record, which flow from a long-standing segregated system." *Milliken* v. *Bradley, supra,* at ____.

Although the three violations already found are not of themselves sufficient to support the broad remedial order entered below, this is not to say that the three violations are insignificant. While they are not sufficient to justify the remedy imposed when considered solely as unconstitutional *actions,* they clearly are very significant as indicia of *intent* on the part of the school board. As we emphasized in *Keyes, supra,* at 207. "Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." Once segregative intent is found, the District Court may

more readily conclude that not only blatant, but also subtle actions—and in some circumstances even inaction—justify a finding of unconstitutional segregation that must be redressed by a remedial busing order such as that imposed in this case.

If it is determined on remand that the school board's unconstitutional actions had a "systemwide impact," then the court should order a "systemwide remedy." *Ante,* at 14. Under *Keyes,* once a school board's actions have created a segregated dual school system, then the school board "has the affirmative duty to desegregate the entire system 'root and branch.' " 413 U. S., at 213. Or, as stated by the Court today in *Milliken,* the school board must "take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' " *Supra,* at ____ quoting *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U. S. 1, 15 (1971). A judicial decree to accomplish this result must be formulated with great sensitivity to the practicalities of the situation, without ever losing sight of the paramount importance of the constitutional rights being enforced. The District Court must be mindful not only of its "authority to grant appropriate relief," *ante,* at 3, but also of its duty to remedy fully those constitutional violations it finds. It should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual school children that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected.

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see *Washington* v. *Davis,* 426 U. S. 229, 253-254 (STEVENS, J., concurring), I join the Court's opinion.

UNITED STATES SUPREME COURT

No. 76-809

BRENNAN v. ARMSTRONG

Per Curiam.

This school desegregation case involves the school system in the city of Milwaukee, Wis. The District Court here made various findings of segregative acts on the part of petitioner School Board members, appointed a Special Master "to develop a plan for the desegregation of the Milwaukee Public School system," and certified its order for interlocutory appeal to the Court of Appeals for the Seventh Circuit. The Court of Appeals, observing that there was "an unexplained hiatus between specific findings of fact and conclusory findings of segregated intent," stated that the District Court is "entitled to a presumption on consistency" and concluded that the findings of the District Court were not clearly erroneous. Neither the District Court in ordering development of a remedial plan, nor the Court of Appeals in affirming, addressed itself to the inquiry mandated by our opinion in No. 76-539, Dayton Board of Education v. Brinkman, in which we said:

"If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." Slip op., at 13-14.

The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of Village of Arlington Heights v. Metropolitan Development Corp., ____ U. S. ____ (1977), and Dayton.

Mr. Justice Stevens, with whom Mr. Justice Brennan and Mr. Justice Marshall join, dissenting.

My concern over the Court's misuse of summary dispositions prompts this dissent.

The Court's explanation of its action gives the erroneous impression that the Court of Appeals' decision related to the question of what kind of remedy is appropriate in this case. Quite the contrary, there was no remedy issue before the Court of Appeals, and that court considered no such issue.

The District Court concluded in a 60-page opinion that "school authorities engaged in practices with the intent and for the purpose of maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools." Amos v. Board of Directors, 408 F. Supp. 765, 818 (ED Wis., 1976). Recognizing that "remedial efforts may well be for naught if the determination of liability is ultimately reversed on appeal," id., at 824, Judge Reynolds certified this issue of law for interlocutory appeal. To further ensure appealability, he entered a general order enjoining future racial discrimination and directing the defendants to formulate desegregation plans. App. 140-141. This order did not call for any particular kind of desegregation plan. Thus, when the case reached the Court of Appeals, the only issue before it was the existence of a violation.[1] After a careful review of the evidence, it concluded that the District Court's finding of intentional segregation was not clearly erroneous. Armstrong v. Brennan, 539 F. 2d 625 (CA7 1976).

This Court now vacates the Court of Appeals judgment and remands for reconsideration in light of two cases. One

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[1]After the case was argued in the Court of Appeals on June 2, 1976 (see 539 F. 2d 625), the District Court entered a broader remedy. App. 1142, 1144.

of those cases[2] is merely a routine application of Washington v. Davis, 426 U. S. 229, which was correctly construed by the Court of Appeals.[3] The other case is relevant to the issue of liability, if at all, only because it supports the Court of Appeals.[4]

Of course, in formulating a remedy, the District Court will need to consider cases such as Milliken v. Bradley, No. 76-447, and Dayton Board of Education v. Brinkman, No. 76-539, if there is any dispute about the proper scope of the remedy. But since no such issue has been decided by the Court of Appeals, there is nothing for it to reconsider in light of these cases. These cases certainly provide no justification for vacating the judgment affirming the District Court's conclusion that the defendants have violated the Constitution. This Court's hasty action will unfortunately lead to unnecessary work by already overburdened circuit judges, who have given this case far more study than this Court had time to give it. Nevertheless, it is quite clear that after respectful reconsideration the Court of Appeals remains free to re-enter its original judgment.

In my opinion the petition for certiorari should be denied. However, since the Court has granted the petition, and since it is not our practice to review findings of fact which the Court of Appeals has already determined to be supported by the record, I would affirm the judgment.

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[2]Village of Arlington Heights v. Metropolitan Development Corp., No. 75-616.

[3]The Court of Appeals cited Washington v. Davis as holding that "a 'racially discriminatory purpose' is essential to an equal protection violation in school cases, as in other cases," and that "purpose may be inferred from 'the totality of the relevant facts,' which may include discriminatory impact," 539 F. 2d, at 633-634; quoting Washington v. Davis, supra, at 242.

[4]Dayton is primarily a remedy case and therefore irrelevant to the action of the Court of Appeals in this case. It does, however, stress the limitations on appellate review in this area, such as the "clearly erroneous" rule, Slip op., at 11, which the Court of Appeals scrupulously followed, e.g., 539 F. 2d, at 637.

UNITED STATES SUPREME COURT

No. 76-705

SCHOOL DISTRICT OF OMAHA v. U. S.

Per Curiam.

This school desegregation case involves the School District of Omaha, Nebraska. The District Court in a comprehensive opinion extensively reviewed the evidence presented by the parties, and recognized that there was considerable racial imbalance in school attendance patterns. Applying a legal standard which placed the burden of proving intentional segregative actions on the respondent, and which regarded the natural and foreseeable consequences of petitioner's conduct as "neither determinative nor immaterial" out as "one additional factor to be weighed," the District Court concluded that the respondent had not carried the burden of proving a deliberate policy of racial segregation. On appeal, the Court of Appeals rejected the legal standard applied by the District Court, stating that a "presumption of segregative intent" arises from actions or omissions whose natural and foreseeable result is to "bring about or maintain segregation." Reviewing the facts found by the District Court concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of one high school in the district, the Court of Appeals generally accepted these factual findings. In each instance, however, it concluded that there was sufficient evidence under the legal standard it adopted to shift the burden of proof to the petitioner. Finding that in no instance had the school carried its rebuttal burden, the Court of Appeals remanded for the formulation of a systemwide remedy. We denied certiorari. 423 U. S. 946.

Following the explicit instruction of the Court of Appeals, th District Court promulgated an extensive plan involving among other elements, the systemwide trans-

portation of pupils. On petitioner's appeal, the Court of Appeals for the Eighth Circuit affirmed.

In Washington v. Davis, 426 U. S. 229, 239 (1976), we said:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."

We restated and amplified the implications of this holding in Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U. S. ____ (1977).

Neither the Court of Appeals nor the District Court, in addressing themselves to the remedial plan mandated by the earlier decision of the Court of Appeals, addressed itself to the inquiry required by our opinion in No. 76-539, Dayton Board of Education v. Brinkman, in which we said:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." Slip op., at 13-14.

The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of Village of Arlington Heights, and Dayton, supra.

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

The Court's remand of this case for reconsideration in light of Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U. S. ____ (1977), and Dayton Board of Education v. Brinkman, ____ U. S. ____ (1977), is inappropriate because wholly unnecessary. The Court of Appeals concluded that "segregation in the Omaha School District was intentionally created and maintained by the defendants." 521 F. 2d 530, 532-533 (1975). The defendants did not contest in the Court of Appeals the finding of the District Court that the Omaha public schools are segregated. Ibid. The Court of Appeals carefully reviewed the abundant evidence in the record bearing on segregative intent and concluded that the evidence justified a presumption that segregative intent permeated defendants' policies concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of 96% black Tech High School. Id., at 537-546. Relying on Keyes v. School District No. 1, Denver, Colorado, 413 U. S. 189, 210 (1973), the Court of Appeals further found that the defendants did not rebut this presumption because they "failed to carry *their burden of establishing that segregative intent was not among the factors which motivated their actions.*" Id., at 536, 537 (emphasis supplied). We denied certiorari. 423 U. S. 946 (1975). When the case came before the Court of Appeals for the second time a year later, the court explicitly reviewed its prior holding in light of our intervening decision in Washington v. Davis, 426 U. S. 229 (1976), and found nothing in that case to cause it to revise its earlier opinion. 541 F. 2d 708, 709 (1976).

Arlington Heights, supra, did not make new law, but only applied the holding of Washington v. Davis that discrimination must be purposeful to be unconstitutional. Arlington Heights interpreted Washington v. Davis to mean

that an action in which an "invidious discriminatory purpose was a motivating factor" is unconstitutional, and that proof that a decision is "motivated in part by a racially discriminatory purpose" shifts the burden of proof to the alleged discriminator. ____ U. S., at ____, ____, n. 21. The conclusion of the Court of Appeals that the defendants "failed to carry their burden of proof that segregative intent was not among the factors which motivated their actions" was based on language from our decision in Keyes, supra, but it so faithfully applies the Arlington Heights formulation that it reads as if the Court of Appeals had anticipated precisely what Arlington Heights would hold five months later. I cannot imagine that the Court of Appeals will do, or properly can do, anything on remand except reaffirm its judgment with a recitation of its gratification that Arlington Heights had been correctly anticipated.

Dayton, supra, reaffirmed the already well-established principle that the scope of the remedy must be commensurate with the scope of the constitutional violation. ____ U. S., at ____. In this case, the District Court ordered a comprehensive decree to remedy the effects of past discrimination, and the Court of Appeals affirmed. As is evident from a reading of the first Court of Appeals opinion describing the massive system-wide intentional segregation in the Omaha School District, a comprehensive order is entirely appropriate. A less comprehensive order would simply not remedy fully the unconstitutional conditions that have been found to exist in the school system. I would affirm the judgment of the Court of Appeals.

Mr. Justice Stevens, dissenting.

For the reasons stated by Mr. Justice Brennan, I cannot join the Court's summary disposition of this case. I would deny certiorari.